United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 75-6121

To be argued by
L. KEVIN SHERIDAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANNICK M. BERNS,

Plaintiff-Appellee,

-against-

CIVIL SERVICE COMMISSION, CITY OF NEW YORK, ALPHONSE E. D'AMBROSE, Personnel Director, Department of Personnel, MICHAEL J. CODD, as Police Commissioner, City of New York, and HARRISON J. GOLDIN, as Comptroller, City of New York,

Defendants-Appellants,

On Appeal From a Judgment of the United States District Court for the Southern District of New York

APPELLANTS' BRIEF

W. BERNARD RICHLAND,
Corporation Counsel of the
City of New York,
Attorney for Defendants-
Appellants,
Municipal Building,
New York, New York 10007.
566-4337

L. KEVIN SHERIDAN,
REUBEN DAVID,
of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ANNICK M. BERNS,

Plaintiff-Appellee,

-against-

CIVIL SERVICE COMMISSION, CITY OF NEW YORK, ALPHONSE E. D'AMBROSE, Personnel Director, Department of Personnel, MICHAEL J. CODD, as Police Commissioner, City of New York, and HARRISON J. GOLDIN, as Comptroller, City of New York,

Defendants-Appellants.

On Appeal From a Judgment of the United States District Court for the Southern District of New York

---

APPELLANTS' BRIEF

Preliminary Statement

This is an action for declaratory and injunctive relief wherein plaintiff, a tenured civil service employee of the New York City Police Department, challenges the proposed termination of her employment based upon a determination by the defendant New York City Civil Service Commission denying her appeal from a determination by the defendant Director of Personnel that she was not

qualified for the position to which she had been appointed by reason of plaintiff's failure to meet the educational requirements listed as a pre-condition for eligibility to take the civil service examination pursuant to which plaintiff was appointed to this position.

The appeal is taken, by the defendants, from a judgment of the District Court for the Southern District of New York (TENNEY, J), entered October 22, 1975, which, upon cross-motions for summary judgment, granted plaintiff's motion for summary judgment (121a)* (in fact, due to an apparent oversight, the judgment, while reciting that plaintiff's motion is granted, "orders, adjudges and decrees" that plaintiff "have judgment against defendants ... dismissing the complaint"; the appeal is taken from this judgment as obviously intended).

The District Court's memorandum opinion is reproduced at pp. 123a-134a of the Joint Appendix. In the Court's opinion, which concludes by stating that the matter is "so ordered" (134a), the Court "declares" that plaintiff's proposed termination is unlawful and states that "defendants are permanently enjoined from terminating her employment for failure to meet the educational requirement" (133a).

*Numbers in parenthesis, unless otherwise indicated, refer to the pages of the Joint Appendix on appeal to this Court.

Questions Presented

1. Has plaintiff shown any violation of rights guaranteed to her by the United States Constition?

2. Assuming, as we urge, that no such violation of plaintiff's constitutional rights has been shown, did the District Court err in not granting the defendants' motion for summary judgment dismissing the complaint?

STATEMENT OF THE CASE

(1)

As the District Court noted in its opinion (130a), the basic facts essential to determination of the parties' cross-motions for summary judgment are not disputed. We here summarize, most briefly, what we believe are the relevant facts. For a fuller statement of the factual background of this case we refer this Court to the District Court's opinion, with which in its statement of the basic facts of the case we take no issue.

(2)

Plaintiff, in accepting appointment to her civil service position with the New York City Police Department, expressly agreed, in writing, that she accepted her appointment "subject to [her] qualifying in the appropriate

character investigation, medical examination and such other qualifications as provided by the Civil Service Law, the Civil Service Rules and Regulations and the advertisement for the examination for the ... position" and subject to the right of the City's Director of Personnel to direct revocation of her certification and appointment if, after subsequent investigation, she was found not qualified for certification or appointment (69a).

A similar right to revoke appointments, limited to three years after appointment, except in the case of fraud (where no time limit is specified), is provided for by New York State Civil Service Law §50(4) where the appropriate municipal civil service commission finds "facts which if known prior to appointment, would have warranted ... disqualification, or upon a finding of illegality, irregularity or fraud of a substantial nature in [the appointee's] application, examination or appointment."

One of the minimum requirements listed for eligibility to take this examination was high school graduation or other listed equivalent (not claimed by plaintiff) (59a). On the application to take the examination, plaintiff, who was born and raised in France, claimed to have graduated from high school (65a), which she also claimed on the "personal history

questionnaire" submitted by her to the Department of Personnel (61a-62a).

Subsequent to plaintiff's appointment and successful completion of her probationary period she was informed that she had been found not qualified by reason of her failure to meet the educational requirements (76a). This notice also informed plaintiff of her right to appeal "in writing" to the City Civil Service Commission (id.), which she did, but which appeal was denied (77a).

Although the District Court in its opinion speaks of "the right to notice and a hearing prior to termination" (129a), it should be noted that plaintiff has been retained in the employ of the Police Department pending her administrative appeal and this litigation. Similarly, it should be noted that defendants take no issue with the quality of plaintiff's work.

(3)

With respect to the question of whether plaintiff met the educational requirements for this examination, the following facts appear in the record:

On her "personal history questionnaire plaintiff lists her date of birth as "10/3/43" (61a).

On that document and on the applilcation to take the examination ("experience paper") plaintiff names as the high school from which she graduated "Ste. Marie" in Paris (62a, 65a). The address indicated for that school is "49 Rue Bobillot, Paris" (62a).

In her complaint in this action plaintiff states that in "June of 1957, after successfully completing eight years of continuous schooling at ECOLE-PRIVEE DE FILLES, a parochial school in Paris, France, plaintiff was graduated and received her Diploma" (8a). (At that point in time, plaintiff would have been four months short of fourteen years of age.) Plaintiff claims to have continued her studies in the same school until January of 1959 (id.), but no further diploma or degree is claimed from that school.

Attached to the complaint, as Exhibit "B" thereto, is a document, in French, bearing the letterhead of "ECOLE PRIVEE DE FILLES SAINTE MARIE" (23a). This is described in the complaint as a "copy of plaintiff's Diploma" (9a), but is identified in an annexed translation of this document as having been "made in Paris on June 11, 1973" (24a), and, the translation indicates that it is a certification

by the principal of the school that plaintiff "born 10.3.43 graduated to CEP (Certificat d'Etudes Primaires) in 1957" (id.).

In her complaint, plaintiff does not claim to have in fact graduated from the French equivalent of an American high school. But, rather, the complaint alleges that "[p]laintiff stated", with apparent reference to her application to take the examination, that the courses she took in said parochial school and her diploma therefrom were the equivalent of a high school diploma (9a), and the theory of her complaint is not that she was in fact qualified to take this examination, but that, on various grounds, notwithstanding plaintiff's failure to meet this requirement for eligibility, once plaintiff had completed her probationary period she could not be removed except upon stated charges and after a hearing (14a-16a) (citing, inter alia Vega v. Civil Service Commission, 385 F. Supp. 1376 [S.D.N.Y. 1974], subsequently vacated and complaint ordered dismissed, by order of this Court dated March 18, 1975 (Docket #75-7007), based on a stipulation of settlement rendering the case moot*).

*Counsel for plaintiff here represented the plaintiff in Vega. The theories of both complaints appear to be identical.

Despite this apparent concession in her complaint, plaintiff, in her affidavit in support of her cross-motion for summary judgment, insists that as of June, 1957, she had completed "secondary education" (118a), and, in addition, she refers therein to other studies allegedly completed by her, which she insists were of an "advanced Academic nature" (119a). In response, defendants submitted to the District Court various documents, including a letter from one Pierre Tabatoni, identified as "Cultural Counselor, permanent representative of French Universities in the United stated", wherein Mr. Tabatoni indicated that the curriculum of the ECOLE SAINTE MARIE "extends from kindergraten to the 'classe de troisieme', which corresponds approximately to the eleventh grade in an American high school" and that a diploma such as plaintiff had from this school "may be considered the approximate equivalent of the eighth grade in the American school system" (96a).

In addition to her studies at the ECOLE-PRIVEE DE FILLES SAINTE MARIE, plaintiff states that she has a "Certificate of Completion from the ECOLE-D'HOTESSES DE PARIS, where [she] completed Finishing Courses in Psychology, Current Events,

Current Affairs, Politics and Poise" (119a). On the exam application and the personnel history questionnaire plaintiff indicates that she attended this school from July, 1961 to October, 1961 (62a, 65a). In a letter dated September 19, 1974 from Henry R. Morse, Assistant Chief in Command, Personnel Bureau, New York City Police Department, to the City Department of Personnel (Exhibit "6" to defendants' answer), Chief Morse states that he has been informed by a Ms. Wolfe of the French Embassy that this school "was a training school for women, ages sixteen (16) to thirty (30) years, to teach young women as guides and hostesses for business conferences, the stock exchange, etc. The emphasis is on composure appearances and character" (74a).

(4)

Although the plaintiff in her complaint appears, at least implicitly, to accept the reasonableness of the defendant Civil Service Commission's determination that she did not in fact meet the educational requirements for this examination (contending, rather, that it was too late for such a determination of ineligibility to be made), as we have noted, plaintiff consistently suggested in her

papers submitted to the court below that she had attained a level of education at least equivalent to that required to graduate from an American high school. And, notwithstanding plaintiff's apparent concession as to the reasonableness of the administrative determination, the District Court, based upon plaintiff's suggestions of equivalent educational attainment, as evidenced by events both prior to and subsequent to her appointment, proceeded to hold -- at least this appears to be the Court's holding -- that in fact plaintiff met the educational requirements for eligibility for this examination. Thus, the Court stated, in what appears to be the basis for its decision (131a-132a):

> "The only possible inference which can be drawn from the facts outlined above is that, while the French and American educational systems are not functional equivalents for the purpose of facilitating a ready comparison, the plaintiff was certainly possessed of a degree of education which entitled her to answer the question regarding her education as she did. Her high achievement on all completitive examinations and her accomplished performance of her police duties buttresses and makes this inference inescapable."

ARGUMENT

THE DISTRICT COURT ERRED IN NOT GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT. ALL PLAINTIFF HAS HERE SHOWN IS THAT SHE IS AGGRIEVED BY A CLEARLY NON-ARBITRARY ADMINISTRATIVE DETERMINATION. SHE HAS NOT BEEN STIGMATIZED OR DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW.

(1)

It should be noted that in this case the District Court expressly declined to reach plaintiff's "estoppel" argument (133a). Instead, it based its decision on its second-guessing the administrative decision of the City Civil Service Commission denying plaintiff's administrative appeal, an avenue for relief which even the plaintiff's complaint did not suggest was available to her.

In response to such an approach by the court below, all we can say is that we are aware of no authority for such intrusion into local administrative matters by either federal or state courts. Certainly, if such intrusion is here appropriate, there is no state or local administrative determination which is not similarly appropriate for de novo review in the federal courts.

Under long accepted principles of judicial review of administrative action this determination was clearly one which presented no basis for intervention by the courts, either state or federal. On the contrary, it represented a proper exercise of administrative discretion in an area committed to the expertise of the agency.

(2)

With respect to plaintiff's "estoppel" argument, not reached by the District Court, we can be even briefer. There is presented here simply no basis for an estoppel of any sort. Plaintiff expressly agreed to accept her appointment subject to subsequent investigation, a procedure expressly sanctioned by New York State law (Civil Service Law §50(4)).

Similarly, plaintiff has shown no violation of due process. She has not been stigmatized or otherwise deprived of "liberty", nor has she been deprived of any right of property accorded to her under state law. Indeed, we would submit, to the extent any "procedural due process" requirement may here be involved, any such requirement was fully met by the administrative appeal procedure that was

provided, wherein plaintiff had the opportunity to make a full record on the issue of her eligibility for this examination.

(3)

In arguing here for reversal of the District Court we are not unmindful of the sympathetic aspects of plaintiff's case. Yet, even assuming such considerations are here relevant, they are not all one-sided. Certain other facts should also be considered, especially the fact that others just as qualified as plaintiff, but just as ineligible, may well have not taken this examination because they were aware--as plaintiff undoubtedly was aware-that they did not meet the eligibility requirements. Equal treatment is the basic premise of civil service, and to allow this plaintiff to here prevail would be directly subversive of that premise.

Unless this Court is to sanction the undermining of even-handed administration of the civil service statutes, the judgment here appealed from must be reversed.

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD BE REVERSED AND SUMMARY JUDGMENT ORDERED ENTERED IN FAVOR OF THE DEFENDANTS, WITH COSTS.

February 9, 1976

Respectfully submitted,

W. BERNARD RICHLAND,
Attorney for Defendants-
Appellants.

L. KEVIN SHERIDAN,
REUBEN DAVID,

of Counsel.

Duly Received
3 copies of appellate brief
2/11/76

Samuel Kennicoff
By Raymond M Wilson 1:40